

1 Alongside the presumption of innocence, one of the fundamental hallmarks
 2 of the American justice system is the prohibition against the use of attacks on a
 3 defendant's character to establish guilt, or to indicate a propensity for committing
 4 crimes.¹ It is well established that this type of evidence has the tendency to lead
 5 the jury "to prejudge one with a bad general record and deny him a fair opportunity
 6 to defend against a particular charge." *Michelson v. United States* (1948) 335 U.S.
 7 469, 475–476. It has been consistently proven that juries employ a much harsher
 8 standard when judging defendants with a criminal past. The type of evidence most
 9 consistently rated damning and prejudicial to a jury's determination was "evidence
 10 suggesting immoral conduct by the defendant." (Teitelbaum, et al., *Evaluating the*
 11 *Prejudicial Effect of Evidence* (1983) Wis. L.Rev. 1147, 1162.)

12 While the Court can instruct the jury that other acts evidence is not by itself
 13 sufficient to prove a defendant guilty of the charged crimes, this evidence remains
 14 undeniably powerful, tipping the scale heavily in favor of a conviction based on
 15 the jury's perception of the defendant's character. Even when this evidence is
 16 carefully limited, it still has the strong potential to overwhelm the actual evidence
 17 regarding the charged offense. As discussed below, the Court should consider
 18 whether admission of any of the proffered evidence would be unduly and
 19 overwhelmingly prejudicial.

20 **I. The Uncharged Acts are not Inextricably Intertwined**

21 Evidence of other acts is admissible as "inextricably intertwined" only if (a)
 22 it constitutes a part of the transaction that serves as a basis for the criminal charge
 23 or (b) it is *necessary* to permit the prosecutor to offer a coherent and
 24 comprehensible story regarding the charged crime. The Government's motion
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 27 ¹ *Michelson v. United States* (1948) 335 U.S. 469, 475–476; *Greer v. United States*
 28 (1918) 245 U.S. 559; 1 Wigmore, *Evidence* (3d ed., 1940) section 57; 1 Wharton,
Criminal Evidence (11th ed., 1935) section 330.

1 relies on this second condition, arguing that without this evidence, the jury may
2 have questions about the evidence before them. However, the standard is not
3 whether the evidence helps the Government's case. Of course it does. The standard
4 for the admission of this extrinsic evidence is whether it is *necessary* to present a
5 coherent story regarding the charged offenses. The Government's case as to the
6 extortions of Y.S., J.L., and S.S., as well as the carjacking of Y.S., is coherent and
7 comprehensive without the admission of the other act evidence.

8 The Government argues that these other acts show why Y.S., J.L., and S.S.
9 complied with Mr. Cho's demands and that they paid not to protect themselves
10 from an outside threat but to protect themselves from Mr. Cho. However, the
11 timeline does not support this. The Indictment alleges extortion of Y.S. in
12 November and December 2020, of J.L. in January and February of 2021, and of
13 S.S. beginning in December 2020. By contrast, all but one of the "other acts" post-
14 date the charged acts by years. The shooting occurred in July, 2022. The assault
15 against D.E. occurred in September, 2022. The extortion of Y.K. did not begin
16 until March of 2022. The extortion of K.Y.J. began at the same time as the charged
17 extortions, in December 2020. The text messages the Government included in their
18 motion concerning "extortion of other victims" are dated October and December
19 2022. And Mr. Cho's actions at the time of his arrest occurred in 2023.

21 The named victims had paid or had been paying Mr. Cho many months prior
22 to the uncharged acts. The extortion of Y.S. (Counts 1 and 2), the carjacking of
23 Y.S. (Count 34), and the extortion of J.L. (Counts 3 and 4) all occurred about a
24 year or more prior to the "other acts" evidence except the extortion of K.Y.J.,
25 which began simultaneously with the extortion of Y.S. and J.L. Likewise, the
26 extortion of S.S. began at the same time, about a year or more prior to the "other
27 acts" evidence except the extortion of K.Y.J., which began simultaneously with the
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1 extortion of Y.S., J.L., and S.S. The Government charged the ongoing extortion of
2 S.S. as Counts 5 through 32, and of those charges, Counts 5 through 20 all
3 occurred prior to the shooting, the assault of D.E., and the extortion of Y.K.

4 Whatever the named victims' reasons for paying Mr. Cho, it could not have
5 been because of acts that occurred thereafter. And it certainly cannot be said to be
6 "inextricably intertwined" with acts that occurred years thereafter.

7 Furthermore, even leaving aside the anachronistic timing, the fact that other
8 individuals, such as K.Y.J, Y.K., and the unidentified "other victims," paid Mr.
9 Cho is not *necessary* in order for the Government to prove whether Y.S., J.L., and
10 S.S. paid out of threatened force, violence, or fear of injury. To the extent that
11 other people also paid Mr. Cho is probative of issues before the jury, it would only
12 be under 404(b). But whether or not this evidence is *probative* is not the test for
13 admissibility as inextricably intertwined evidence. The standard here is whether it
14 is *necessary* in order for the Government to present a coherent and comprehensive
15 version of events, and clearly it is not. Y.S., J.L., and S.S. will all testify that they
16 paid because Mr. Cho threatened violence, and the Government will present text
17 messages from Mr. Cho to support that. They will testify that they paid because
18 they wanted to be able to access the karaoke clubs that Mr. Cho "controlled," and
19 the Government will present text messages and testimony to support that. S.S. will
20 testify that he knew about the assault of Y.S. for non-payment, and that that is part
21 of why he continued to pay Mr. Cho, in addition to the reasons he started in the
22 first place. The Government's case will be complete and coherent from the
23 evidence of the charged acts. The evidence of the other acts *is* extricable from the
24 charged acts, and therefore the Court should not admit it on this basis.

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II. The Requirements of FRE 404(b) are Not Met

The Government argues that all of the uncharged acts are admissible under Rule 404(b) to show Mr. Cho's motive, state of mind, plan and preparation, and identity. However, this argument does not succeed as to all of the uncharged acts. The shooting, if proven to have been committed by Mr. Cho, bears no meaningful similarity to the carjacking or the extortion so as to credibly prove identity or state of mind as to those charged instances. "This showing of similarity is necessary because if the other act is not sufficiently similar to the crime charged, it does not tell the jury anything about what the defendant intended... unless, of course, one argues (impermissibly) that the [other] act establishes that the defendant has criminal propensities." *United States v. Preston* 873 F.3d 829 (9th Cir. 2017.)

Similarly, the assault of D.E. in September 2022 is not probative of a material issue, nor does it go to a permissible purpose under 404(b). The proposed evidence about D.E. from September 2022 is not probative of Mr. Cho's state of mind regarding the extortions of Y.S., J.L., or S.S. nor the carjacking of Y.S., all of which started two years prior to the assault of D.E. Of course, the Government wants to present to the jury evidence of Mr. Cho assaulting D.E. because it makes it more likely that he assaulted S.S. and Y.S. But that is exactly what Rule 404(b) means by prohibiting evidence offered "to prove the character of a person in order to show that he acted in conformity therewith."

Furthermore, the shooting and the assault of D.E. also fail to meet the requirement under 404(b) that there be sufficient evidence of the uncharged acts. At best, the evidence of the shooting is that Mr. Cho was angry that J.K. brought doumi to On and Off Karaoke. Mr. Cho spoke with J.K. about it. After an hour in the karaoke club, the doumi got back in the van and they drove away. Someone shot at the van with a revolver. Despite there being surveillance video and two witnesses who knew Mr. Cho standing right near where the shooting occurred, there is neither video nor eyewitness testimony that putting Mr. Cho at the location

1 at the time of the shooting. Mr. Cho's cell phone pinged several blocks away,
 2 which is not probative; there is no dispute that Mr. Cho was in Koreatown that
 3 night, as he was many nights. Mr. Cho heard about the shooting and called the
 4 manager of On and Off to find out what was going on. Despite agents finding
 5 many guns in Mr. Cho's house, none of them was the gun involved in this
 6 shooting. And contrary to the Government's argument that Mr. Cho boasted about
 7 his acts of violence in order to encourage compliance, Mr. Cho never admitted to
 8 this shooting because he did not commit it.

9 To prove this incendiary accusation, the Government's witness list proposes
 10 calling only one witness, R., to testify for 15 minutes about this incident. Likewise,
 11 they propose not D.E. but M.M. to introduce blurry, silent video of an alleged
 12 assault. Mr. Cho asks that the Court hear from the Government as to how R. and
 13 M.M. alone are going to prove that these uncharged acts were committed by Mr.
 14 Cho to a standard sufficient to satisfy 404(b).

15 **III. The Evidence Should Be Excluded Under Rule 403**

16 Even where evidence of other acts is admissible as "inextricably
 17 intertwined" or under Rule 404(b), the evidence must still survive a Rule 403
 18 balancing test. *U.S. v. Miller*, 874 F.2d 1255, 1268 (9th Cir. 1989.) "The evidence
 19 may be accepted only if, on balance, its probative value is not substantially
 20 outweighed by the danger of unfair prejudice to the defendant." *State of Ariz. v.*
 21 *Elmer*, 21 F.3d 331, 336 (9th Cir. 1994.)

22 As discussed above, the other acts evidence is of limited relevance or
 23 probative value due to their temporal relationship with the charged acts, the
 24 weakness of the evidence supporting some of the other acts, and the otherwise
 25 minimal connection to the charged acts. "Relevance is a fairly coarse filter, and
 26 when evidence is minimally relevant, it is likely to be minimally probative as well.
 27 Moreover, a decision regarding probative value must be influenced by the
 28 availability of other sources of evidence on the point in question. . . . And, as we

1 have noted: Where the evidence is of very slight (if any) probative value, it's an
2 abuse of discretion to admit it if there's even a modest likelihood of unfair
3 prejudice or a small risk of misleading the jury.” *U.S. v. Wiggan*, 700 F.3d 1204,
4 1213 (9th Cir. 2012) (internal citations omitted.)

5 The Court must therefore balance the first factor, the probative value of the
6 evidence, against the time-consuming nature of the evidence and the probability of
7 undue prejudice from the evidence. If the Government presents enough evidence of
8 the uncharged acts to satisfy 404(b)’s sufficiency requirement, these additional acts
9 will sidetrack this Court into a series of mini trials on collateral incidents, unduly
10 consuming the Court’s time. The charged acts alone involve three victims and 34
11 counts. Through their other acts evidence, the People seek to introduce another six
12 or seven witnesses and evidence of a shooting, an assault, an extortion lasting six
13 months, an extortion lasting over a year, however many extortions they intend to
14 present through their unnamed other victims, as well as testimony about Mr. Cho’s
15 conduct at arrest. Of the 10-hour estimate for the Government’s witnesses, a clear
16 four hours of it would be consumed solely by other acts witnesses. On top of that,
17 some portion of their witnesses testifying about Mr. Cho’s cell phone contents and
18 about Mr. Cho’s cell phone location will be about these other acts. It is not an
19 exaggeration to say that about half of the Government’s extremely conservative
20 time estimate will be consumed by this other acts evidence. Cross-examination of
21 these witnesses will of course add to this time expenditure, and the defense may
22 call additional witnesses to counter these allegations. Furthermore, this evidence
23 will require additional instructions and occupy more time in argument. Notably, all
24 of this court time will be spent on evidence ostensibly to prove facts that are
25 already proven by the evidence of the charged acts.

26 In sum, the other acts evidence is not just overkill, there are so many alleged
27 uncharged acts that hearing this evidence will result in doubling the trial length to
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1 prove facts that are not at issue. In light of the foregoing, the Court should exclude
2 all of the proposed uncharged acts evidence.

3 Second, the Court should exclude testimony regarding uncharged acts that
4 are more despicable or egregious than the charged offenses. The evidence of the
5 shooting falls squarely within this prohibition. There is no evidence of gun
6 violence against any of the charged victims. By contrast, the evidence regarding
7 the shooting will be that Mr. Cho fired a gun at an occupied car, striking a young
8 woman – an innocent victim in his feud with the driver – in the neck. That is a
9 significant escalation from the evidence that will otherwise be before the jury, and
10 the Court should not admit it. Although less of an escalation, the evidence of the
11 assault against D.E. is evidence of Mr. Cho personally inflicting bodily harm on
12 someone. Admitting the evidence of this assault against D.E. adds to the aura of
13 Mr. Cho as a dangerous man who violently hurts those who disobey him. This
14 prejudicial effect overpowers any purported probative value, especially when
15 coupled with the fact that this assault occurred after almost all of the charged acts.

16 By their charging decisions, the Government will already have the benefit of
17 three separate witnesses testifying that Mr. Cho extorted them. Introducing
18 evidence of a fourth, fifth, and unknown “other” extortion victims provides no
19 additional probative value to the jury. Rather, it is cumulative. “The district court
20 has considerable discretion even with admittedly relevant evidence in rejecting that
21 which is cumulative.” *U.S. v. Elksnis* 528 F.2d 236, 239 (9th Cir. 1975.)

22 Similarly, the evidence of Mr. Cho’s reaction to his arrest is also cumulative
23 and of minimal probative value. First, the Government overstates its evidence that
24 “the defendant attempted to flee” and that authorities apprehended him “after an
25 extended standoff.” The investigators’ report says that Mr. Cho opened a bathroom
26 window, “appeared he was getting ready to lift himself up to jump out,” but did
27 not. Looking out one’s window when one’s house is surrounded by law
28 enforcement at 4:00a.m. is not evidence of flight. The report further states that

agents detained Mr. Cho at 4:08, approximately eight minutes after law enforcement's arrival. By no measure is that an "extended standoff." This evidence is of limited probative value to the offenses charged. There were numerous illegal firearms and other contraband in Mr. Cho's house, Mr. Cho is not a United States citizen, and Mr. Cho had been working for years in a "gray market" business. There are any number of reasons he did not welcome federal agents into his home, and any connection to the charged offenses is pure speculation.

Furthermore, the evidence of Count 33 will include testimony from S.S. and law enforcement agent(s) about Mr. Cho's desire to escape detection by law enforcement. That is the meeting that law enforcement monitored, during which the Government alleges that Mr. Cho took evasive action such as changing the location of the meeting, asking S.S. if he called the police, and cancelling their meeting. Mr. Cho did not want to encounter law enforcement *in connection with the charged acts*. The evidence of the charged acts establishes that directly. Evidence of Mr. Cho's actions at the time of his arrest is superfluous to that evidence and is only relevant "to show criminal disposition," an impermissible use of other acts evidence. *United States v. Lewis* 837 F.2d 415, 419 (9th Cir. 1982).


IV. Conclusion

For the forgoing reasons, Mr. Cho respectfully requests that the Court deny the Government's motions.

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Respectfully submitted,

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